U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: January 28, 1999

Case No.: 1996-INA-0205

In the Matter of:

LARRY'S TREE SERVICE,
Employer

On Behalf Of:

PEDRO ESCALERA,
Alien

Certifying Officer: Rebecca Marsh Day - Region IX

Appearance: Roger J. Gleckman, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the

alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties, 20 C.F.R. § 656.27(c).

Statement of the Case

On October 18, 1993, Larry's Tree Service ("Employer") filed an application for labor certification to enable Pedro Escalera ("Alien") to fill the position of Tree Surgeon (AF 19-24). Employer described the duties for the position as follows:

> Responsible for pruning trees and shrubs in yards, parks and private homes. Treat trees to improve its [sic] health and appearance. Cut out dead and undesirable limbs. Spray and dust pesticides on shrubs and trees to control disease; Spray fertilizers to increase its growth. Also responsible for planting trees for landscaping in private and business residences. Transplant plants and shrubs using manual and power operated equipment.

(AF 19).

The requirement for the position is two years of experience in the job offered (AF 19).

The CO issued a Notice of Findings on July 17, 1995 (AF 7-9), proposing to deny certification on the grounds that, in violation of 20 C.F.R. § 656.50,[2] Employer failed to demonstrate that "a current job opening or on-going business exists to which U.S. workers can be referred" (AF 8). The CO noted that by signing the labor certification application Employer certified, *inter alia*, that it will be "able to put the alien on the payroll on or before the date of the alien's proposed entrance into the United States" (AF 8). The CO's doubts in this matter arose because "both address [Employer has] given are residences, [Employer has] no recorded

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] Recodified on October 23, 1991 as 20 C.F.R. § 656.3.

employees, and [Employer has] no 'yellow page' listing" (AF 8). The CO directed Employer to "[s]ubmit rebuttal [evidence] documenting an on-going business and a current unfilled job opening. Include with this a copy of [Employer's] business license ..., State and federal income and business tax returns" (AF 8). Accordingly, Employer was notified that it had until August 21, 1995 to rebut the proposed findings (AF 7).

In its rebuttal,[3] dated August 17, 1995 (AF 4-6), Employer contended that it is an 'employer' as defined by 20 C.F.R. § 656.3. Employer argued that the nature of its business, on-site landscaping and gardening, makes it unsurprising that its business address is also a residence (AF 5). Employer notes that it is listed on Page 988 of the Pacific Bell Telephone directory (AF 4). Employer submitted an application for its City of Los Angeles Tax Registration Certificate, bearing a starting date of July 26, 1995. Employer referred to a receipt for payment of its Los Angeles tax registration, although neither the Appeal file nor Employer's telefax contains this receipt. Employer submitted a Federal income tax Schedule C (Form 1040) Profit or Loss From Business for the tax year 1994, arguing that this demonstrates Employer's "ability to pay the wages for the position" offered" (AF 5). Employer also attached the Affidavit of Hilarion Haro, who signed the labor certification application under the name "Larry Haro." In that affidavit, Mr. Haro swore to the following: he is the sole proprietor of Larry's Tree Service; he has operated that business since 1970; he normally employs between two and ten people; he pays many of his employees as independent contractors; he has no need for a business location separate from his residence; he has need to hire two tree surgeons; and, he has the ability to pay the wages of the individuals he plans to hire.

The CO issued the Final Determination on December 13, 1995 (AF 2-3), denying certification because Employer remains in violation the regulation 20 C.F.R. § 656. The CO stated that "[a]ll rebuttal documentation has been taken into consideration, however, [Employer] failed to satisfactorily rebut the [proposed] findings ...." (AF 3).

On January 11, 1996, Employer appealed denial of its labor certification application to the Board of Alien Labor Certification Appeals ("BALCA" or "Board") (AF 1). The CO forwarded the record to the Board. Employer submitted a Brief on April 15, 1996.

---

[3] The Appeal File forwarded to the Board did not contain Employer's rebuttal attachments. On October 21, 1997 an Order issued directing the CO to fulfill its obligations under 20 C.F.R. § 656.26(c)(1) and (2) by immediately forwarding the attachments to the undersigned Administrative Law Judge and thereby complete the file. In a letter received on December 30, 1997, Employer inquired as to whether the CO had complied with the Order. The CO had not done so. Employer requested that, if the CO had failed to comply, the CO be estopped from contesting Employer's appeal and the case be remanded to the CO with instructions to grant the application. On January 9, 1998, at the request of the undersigned Administrative Law Judge, Employer telefaxed copies of the attachments, which were then included in the Appeal File. Due to the poor quality of the telefax, parts of the telephone directory listing are illegible. Because of the CO's non-compliance with the Order, we have credited Employer's description of the contents of that portion of the attachments.

Discussion

The CO denied Employer's labor certification application in the case *sub judice* on the grounds that Employer failed to prove it qualifies as an 'employer' as defined at 20 C.F.R. § 656.3. We agree.

As a preliminary matter, Employer's request that the CO be estopped from contesting the appeal must be denied. The Board lacks the authority to grant Employer such relief.

The regulations define an 'employer' as "a person, association, firm or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States ...." 20 C.F.R. § 656.3. Employer bears the burden of proving that it meets the definition of 'employer' in the regulations and must provide copies of relevant documentation as requested by the CO. *Kogan & Moore Architects, Inc.*, 90-INA-466 (May 10, 1991). In the NOF, the CO directed Employer to provide documentation of "an on-going business and a current unfilled job opening .... [including] a copy of your business license [and] State and federal income and business tax returns" (AF 8). Employer's rebuttal documentation consisted of an affidavit signed by Hilarion 'Larry' Haro, a page from the Western Los Angeles telephone yellow pages, an application for a City of Los Angeles Tax Registration Certificate, and a Schedule C (Form 1040) for tax year 1994.

By signing the alien labor certification application, Employer has certified, *inter alia*, to the following: it has sufficient funds to pay the alien; it will be able to place the alien on its payroll by the date of the alien's proposed entrance into the United States; and, the job opportunity has been and is clearly open to any qualified U.S. worker (AF 20). Implicit in this certification is that Employer is an actual, viable business entity. This makes much of Employer's affidavit superfluous. Specifically, Employer's claims "to have been in business since 1970, to have employed an average of between two and ten people during that time, and to have a current need for two tree surgeons" provides no more evidence of its actual existence as a business entity than does the application. The Tax Registration Certificate application is dated after the issuance of the NOF and does not indicate whether the desired Certificate was issued. Even if, *arguendo*, such a certificate is necessary to do business, it does not follow that possession of the Certificate means an employer is in fact operating an actual business. Employer's Schedule C (Form 1040) was submitted without the rest of the tax return and, thus, does not bear a signature. Further, the Schedule C bears the business name of 'Hilarion Haro' rather than 'Larry's Tree Service.' Employer's rebuttal evidence is flawed and does not support its contention as strongly as it perhaps had hoped.

Employer's weak rebuttal evidence, Employer's failure to provide State income and business tax returns as directed, and Employer's affidavit testimony that many of its employees are actually independent contractors amount to the failure of Employer to prove by a

preponderance of the evidence that it qualifies as an 'employer' under the definition given at 20 C.F.R. § 656.3. We therefore affirm.[4]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

[4] In the Final Determination the CO appears, as noted in Employer's appeal brief, to have added a new rationale for denying Employer's application: Employer's inability to pay the wages of the employees it is proposing to hire. It is clear, however, that the CO is also denying the application on a grounds identified in the NOF: that Employer has failed to prove it qualifies as an 'employer' as defined by the regulations. Because the Board can affirm on the latter grounds, we do not reach the question of any possible impropriety regarding the former.